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No. 83-2028

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

THOMAS A. GARDNER,

Petitioner,

vs.

TEC SYSTEMS, INC.,
a Wisconsin corporation,
ROY E. DOWNHAM, JACK ECKELAERT
and JOHN W. FROST,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENTS

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STATUTES INVOLVED

35 U.S.C. § 103. Conditions for patentability; non-obvious subject matter

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. . . .

35 U.S.C. § 282. Presumption of validity; defenses

> A patent shall be presumed valid. . . .The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.
>
> The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:
>
> . . .
>
> (2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability,
>
> . . .

Federal Rules of Evidence, Rule 301. Presumptions in General in Civil Actions and Proceedings

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

STATEMENT OF THE CASE

Since the determination of this Petition for Certiorari does not require review of the factual merits, respondent omits a recitation of the facts established at trial and incorporates by reference the concurrent findings of the District Court and the Court of Appeals for the Federal Circuit for its statement of the facts of this case. In passing, however, respondent notes that petitioner not only asserts as facts that which have twice been found against him, but strays beyond the record to include assertions for which there is no record evidence.

The only cognizable issue asserted by petitioner is whether or not he received the benefit of the presumption of validity of his patent, which is provided by 35 U.S.C. 282. Determination of that question requires, not a review of the evidentiary record below, but an examination of what the courts below did.

This case was tried to the Court, beginning January 19, 1976, and the trial consumed a total of 24 days producing 3,589 pages of transcript and numerous exhibits. No time limitations were imposed upon the parties at trial. Nor did the Trial Court limit the number of witnesses the parties could call, or exhibits and amount of demonstrative evidence they could offer. In all, ten different persons testified, four for the plaintiff-petitioner and six for the defendant-respondent.

The plaintiff-petitioner offered himself as his only expert, and relied upon his own extended testimony and the presumption of validity of his patent for the burden of his case. The defendants

called as witnesses, two individual defendants, two former employees of plaintiff's licensee, Overly, Inc., an employee of one of Overly, Inc.'s customers, R. R. Donnelly Printing Company, and the expert, Dr. Daane. Defendants qualified as experts Messrs. Downham, Eckelaert and Daane, as well as the two former employees of plaintiff's exclusive licensee. The defendants also presented demonstrations of working models and motion pictures of tests conducted outside of court. The parties filed extensive pretrial briefs, post-trial briefs and proposed findings of fact and conclusions of law.

The trial Court rendered its decision in the form of a 45-page "Memorandum and Order" which included 102 findings of fact and conclusions of law, following a page-and-a-half statement of the case, and entered judgment holding petitioner's patent invalid for obviousness under 35 U.S.C. 103. Plaintiff-petitioner filed a number of post-trial motions, including motions for a new trial and motions to alter and amend the judgment, and the Court denied those motions in a 15-page "Decision and Order," in which it reviewed and reaffirmed its essential findings and conclusions.

It is not disputed that the District Court made a thorough and meticulous analysis of the invention claimed in the patent and the teachings of the prior art. Nor is it disputed that the District Court accurately applied the analysis promulgated by this Court in *Graham v. John Deere Co.*, 383 U.S. 1, 17-18, 15 L. Ed. 2d 545, 556, 86 Sup. Ct. 684 (1966). Petitioner complains only of the results of that analysis, and of the facts found by the District Court and affirmed on appeal.

On appeal to the Court of Appeals for the Federal Circuit, plaintiff-appellant asked that Court, as he asks this Court, to find that the District Court had erred "in ignoring the presumption of validity of the patent in suit . . ." The Court of Appeals for the Federal Circuit devoted the largest part of its opinion to a careful, detailed and explicit analysis and resolution of that issue. In doing so, the Court of Appeals not only reviewed in complete detail the decision of the District Court, but also all of the evidence of record, and on the basis of its analysis affirmed the District Court.

After describing the *Graham v. John Deere* analysis, the Court of Appeals stated the issue to be determined under 35 U.S.C. 103, recast it in terms of the facts of the case, and added:

> By virtue of the *statutory presumption of validity,* 35 USC 282, it was up to TEC, the party asserting invalidity, to prove facts which would permit the trial court to answer this question in the affirmative. (Italics added)

725 F.2d at 1345, A 15.

The Court of Appeals next described the weight of the burden on TEC as follows:

> As for the *standard of proof TEC* had to meet to prove it, we note that the claims were allowed over Vits, and that no reference shows more than does Vits. It is thus perfectly clear that TEC in effect asked the trial court to cover precisely the same ground as that covered by the PTO in its quasi-judicial determination of patentability that it is authorized and required by statute to render. Therefore, *TEC's burden on this point was a heavy one.*
>
> Bearing the foregoing in mind, we arrive at the nub of this case. If we are to agree with the trial court, we must have from it a finding supported by the record that TEC proved by *clear and convincing evidence* that a Gardner air bar coming within the claims of the '447 patent is not in any significant respect different from similar devices available in the prior art because structural differences over the prior art do not necessarily result in differences in performance over the prior art. Since there is no express finding to this effect, we scrutinize the court's opinion to see whether we can infer such a finding from all that is said therein. (Italics added)

725 F.2d at 1345, A 16.

Based upon its detailed scrutiny of the District Court's findings and conclusions, the Court of Appeals concluded as follows:

> Although it never said so in precise terms, the trial court was unquestionably of the firm conviction that the proofs adduced at trial showed *clearly and convincingly* that the dimensional limitations of claim 1 failed to particularly point out a feature of an air bar which performed any differently from prior art bars, in other words, that those limitations are a verbal difference only. (Italics added)

725 F.2d at 1346, A 18.

The Court of Appeals then stated the issue presented to it for determination as follows:

> The opinion of the trial court, as well as the arguments of Gardner himself, make clear that resolution of this case turned at least partially on testimony given and exhibits displayed at trial. Accordingly, we apply the clearly erroneous standard. Was the trial court clearly erroneous in its conviction that the proofs adduced at trial showed *clearly and convincingly* that the dimensional limitations of claim 1 made no significant difference in the operation of an air bar? (Italics added)

725 F.2d at 1347, A 19.

After reviewing all of the evidence of record, and arguments presented by the parties, the Court of Appeals for the Federal circuit held as follows:

> The trial court would not have been clearly erroneous in concluding that the dimensional limitations did not specify a device which performed and operated any differently from the prior art. Its decision therefore stands.

725 F.2d at 1349, A 23.

ARGUMENT

The Petition for Certiorari should be denied because none of the reasons for granting the petition set forth in Rule 17, or otherwise supporting its grant are present. There can be no considerations involving state court decisions because this is an action arising under Title 35 of the U.S. Code, jurisdiction over which resides exclusively in the federal courts. There is no conflict between the decision of the Court of Appeals for the Federal Circuit and that of any other court of appeals. There is no departure by the Court of Appeals from any accepted or usual course of judicial proceeding, nor did the Court of Appeals sanction any such departure by a lower court, such as to call for an exercise of this Court's power of supervision.

Thus, petitioner can only contend that the Court of Appeals for the Federal Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. In making such an argument, he is demonstrably wrong.

The Court of Appeals for the Federal Circuit expressly addressed the same contention which petitioner makes here, i.e., that he had ". . . not been accorded the benefit of the presumption of validity." (Pet. 18) The Court of Appeals made a "full and independent review" of the District Court's conclusion, 725 F.2d at 1344, A 13, and a "painstaking review of the opinion of the trial court and the briefs on appeal", 725 F.2d at 1345, A 14. After reviewing the entire record and summarizing the "salient evidence introduced at trial", 725 F.2d at 1347, A 19, the Court of Appeals concluded, "Having surveyed all of the above-mentioned evidence, as well as other evidence cited to us by the parties, we are not 'left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948)."

Petitioner's protracted rearguments of the evidence of record coupled with his failure to specify any legal error in the lower

courts' analysis, and his superficial and preemptory treatment of the law pertaining to presumptions belies his contention that he asks this Court to review the law of presumption. The petition makes it appear as though his real purpose is to obtain this Court's review of the concurrent findings of the lower courts on the record evidence. However, this Court does not grant Petitions for Certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227. As this Court observed in another patent case, "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error. . . . [authorities] . . ." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.,* 336 U.S. 271, 276, 93 L. Ed. 672-677 (1949). A careful review of the presumption of patent validity as construed and applied by the Court of Appeals for the Federal Circuit demonstrates that there is no occasion for this Court's review.

The Court of Appeals' construction of the statutory presumption of validity, and the levels of proof required, appears in a succession of consistent decisions that are based squarely on the patent statute, the Federal Rules of Evidence and the decisions of this Court. The predecessor of the Court of Appeals for the Federal Circuit, the United States Court of Customs and Patent Appeals (hereafter "CCPA"), provided a thorough analysis of the presumption of validity in its seminal decision in *Solder Removal Company v. ITC,* 582 F.2d 628 (1978).

In the *Solder Removal* case, the CCPA affirmed the ITC's decision that the patent in issue was invalid for failure to satisfy the condition of patentability in 35 U.S.C. 103. In doing so, the CCPA construed Rule 301 of the Federal Rules of Evidence in light of 35 U.S.C. 282, and held as follows:

> Rebuttal of the presumption may be more easily and more often achieved in reliance on prior art more pertinent than that considered by the examiner; but whether rebuttal is achieved requires careful consideration of whether the prior art relied upon does in truth render

> the claimed invention anticipated or obvious. Until that question is answered in the affirmative, the presumption is not rebutted and continues alive and well.
>
> The first sentence of § 282, that "[a] patent shall be presumed valid," must be read in the context of the remainder of the first paragraph of § 282, which provides that the party asserting invalidity bears the burden of establishing it. Section 282 thus mandates not only a presumption shifting the burden of going forward in a purely procedural sense, but also places the burden of persuasion on the party who asserts that the patent is invalid. To speak of the presumption as "no longer attaching" is to risk a concomitant, and unspoken, assumption that the burden of persuasion is thereafter no longer upon him who asserts invalidity. That view is contrary to the meaning of § 282, for the burden of persuasion is and remains always upon the party asserting invalidity, whether the most pertinent prior art was or was not considered by the examiner.

582 F.2d at 632-633.

The CCPA in *Solder Removal* also addressed a contention that petitioner here raises, ruling as follows:

> The statute does not make the presumption applicable in some situations and not in others. . . .
>
> Though the presumption of validity remains in existence until rebutted and the burden of persuasion continues throughout the litigation on him who asserts invalidity, the burden of persuasion may be more easily carried by evidence consisting of more pertinent prior art than that considered by the examiner.

582 F.2d at 633.

The CCPA in *Solder Removal* also disposed of another error, which petitioner attempts to resurrect here (Pet. 24-5), stating in footnote 10:

> Application of § 282 in its entirety has suffered from analogy of the presumption itself to the deference due administrative agencies.

582 F.2d at 633.

The Court of Appeals for the Federal Circuit adopted the *Solder Removal* analysis of 35 U.S.C. 282 in *Aktiebolaget Karlstads Mekaniska Werkstad and KMW-Johnson, Inc. v. ITC*, 705 F.2d 1565, 1577 (1983). In *SSIH Equipment S.A. v. ITC*, 718 F.2d 365, 375 (1983), the Court of Appeals for the Federal Circuit applied the *Solder Removal Co. v. ITC* analysis, and added to it, "The presumption of validity afforded by 35 U.S.C. § 282 does not have independent evidentiary value." 718 F.2d at 375. Petitioner has singled out that interpretation of the presumption, seemingly to suggest that it is somehow in error (Pet. 28).

However, if that is petitioner's purpose, petitioner assumes the burden of repealing the clear mandate of Congress and reversing the premise of this Court's adoption of the Federal Rules of Evidence. The Notes of the Advisory Committee on Proposed Rules as to Federal Rule 301, describe a presumption in civil actions as originally proposed and approved by this Court* as follows:

> Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once

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*Rule 301. Presumptions in General. In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on a party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

> the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. . . . [authorities] . . .
>
> The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. . . . [authority]. . .

The Notes of Committee on the Judiciary, House Report No. 93-650, reveal that the House sought to treat presumptions as evidence, as follows:

> With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgement implicit in the Court's version that the so-called "bursting bubble" theory of presumptions, whereby a presumption vanished upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced — a view shared by only a few courts — lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.

The Senate Committee disagreed with the House Committee, stating in the Notes of Committee on the Judiciary, Senate Report No. 93-1277 as follows:

> The effect of the amendment is that presumptions are to be treated as evidence.
>
> The committee feels the House amendment is ill-advised. As the joint committee (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." . . .
>
> . . .
>
> For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence.

The Notes of Conference Committee, House Report No. 93-1597, after discussing the two versions, reports that, "The Conference adopts the Senate amendment." The Court of Appeals for the Federal Circuit simply follows that clear mandate.

In *SSIH Equipment SA v. ITC*, 718 F.2d 365, 379-381, the Court of Appeals also defined the standard of proof required to rebut the presumption of validity as "clear and convincing evidence." In doing so, the Court of Appeals expressly adopted this Court's analysis stated in *Addington v. Texas*, 441 U.S. 418, quoting from pp. 423-25 of that decision at 718 F.2d 380-81.

In *Kalman v. Kimberly-Clark Corporation*, 713 F.2d 760, 773 (1983), the Court of Appeals for the Federal Circuit corrected the lower court's statement that by 35 U.S.C. 282, Congress had "shifted" the burden of proof to the party challenging validity, by stating that 35 U.S.C. 282 ". . . places it there and there it stays," reiterating the statement of the presumption of validity in *Solder Removal Co. v. ITC*, 582 F.2d 628, 632-633 (1978), and citing also *Chicago Rawhide Mfg. Co. v. Crane Packing Co.*,

523 F.2d 452, 457 (7th Cir. 1975). The Court of Appeals again applied its *Solder Removal Co. v. ITC* and *SSIH Equipment S.A. v. ITC* analysis of the presumption of validity in *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530 at 1534, (which petitioner quotes, Pet. 29). The Court of Appeals for the Federal Circuit also consistently applies the same analysis in *Hughes Aircraft Co. v. United States*, 717 F.2d 1351 at 359, and in *American Hoist & Derrick Company v. Sowa & Sons, Inc.*, 725 F.2d 1350 (1984), which was handed down on the same date as the decision in this case, and in this case.

Shortly before the Court of Appeals for the Federal Circuit was created, the Fourth Circuit Court of Appeals independently developed precisely the same construction of the 35 U.S.C. § 282 presumption of validity in *Tenneco Chemicals, Inc. v. William T. Burnett & Co., Inc.*, 691 F.2d 658, 663-664 (4th Cir. 1982).

Petitioner seems oblivious of the fact that the words "presumption" and "presumed" have become technical words of art, incorporating more than a century of judicial experience and wisdom, an enormous amount of scholarship, and numerous codifications and recodifications, which culminated in Rule 301 of the Federal Rules of Evidence*. As evidenced by the Committee reports, Congress was well aware of and relied upon that law in enacting the Federal Rules of Evidence.

Also to suggest, as petitioner does (Pet. 21), that there was no legislative antecedent for the presumption of validity in 35 U.S.C. 282 is not entirely accurate. In this portion of the 1952 patent act, Congress reconciled the patent statutes with the Federal Rules of Civil Procedure. In old 35 U.S.C. 67, R.S. § 4919, the patent statute had provided that a patentee would have an action in the nature of trespass on the case for infringement, and this was replaced in 1952 by 35 U.S.C. 281 which states that, "A patentee shall have a remedy by civil action for infringement of his patent." Thus, where the following section of the old statute,

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*See 9 Wigmore, Evidence §§ 2483-2493 (Chadbourn rev. 1981).

35 U.S.C. 69 R.S. 4920, provided the defendant "may plead the general issue, and . . . may prove . . . special matters . . ." as affirmative defenses, Congress in 1952 substituted 35 U.S.C. 282, which provides that, "A patent shall be presumed valid. . . . [etc.] . . . The following shall be defenses . . . [etc.] . . ." In short, the old statute, like the current 35 U.S.C. 282, expressly placed the burden of proving invalidity upon the defendant, but the modern version, 35 U.S.C. 282, by using "presumption" terminology, is more precise and definitive.

Petitioner asks this Court to exempt patent cases from the Rules of Evidence, and to evade the intent of 35 U.S.C. § 282 by giving the word "presumed" a common dictionary meaning, instead of treating it as a word of art. By this device, petitioner would have this Court, in patent cases, wipe out a century or more of judicial experience and wisdom, and scholarly and codifying efforts, and start from the beginning, not with one relatively clear rule, but the six subjective and novel rules that petitioner proposes (Pet. 33-34). Petitioner would leave the law of evidence in shambles just to validate his patent, which two courts have held should never have been issued. In all other patent cases, according to petitioner's proposal, the courts would need to repeat that century or more of experience accumulated in developing the existing law of presumptions, not only once, but six times, and that would only define the presumption in cases analogous to this one. As for cases where the prior art at trial differs from that considered by the examiner in issuing the patent in suit, presumably petitioner would want a different set of rules, but he is silent as to that.

Petitioner cites no precedent for the relief he seeks. Petitioner points to no authority in the statute or elsewhere to support this Court's embarking on such a legislative excursion. Petitioner cannot even provide a rational basis for his extraordinary request.

The cornerstone of petitioner's demand is his charge, which he made in his brief on appeal as well as this petition, that courts in general, and particularly the courts that held his patent invalid, lack the intellectual capacity to comprehend "scientific principals" (Pet. 31, 34) involved in patent cases, the latter courts apparently having suffered from petitioner's instruction. That startling argu-

ment coupled with petitioner's apparent failure to apprehend the procedural and evidentiary meaning of "presumption" brings to mind Henry David Thoreau's observation that, "Sometimes we are inclined to class those who are once-and-a-half witted with the half-witted, because we appreciate only a third part of their wit."*

The truth is that Patent Examiners, whose decisions, according to petitioner, the courts are not competent to review, are not recruited on Mt. Olympus, but from the same fallible human race as lawyers, judges and inventors. In this age of science and technology, the courts of necessity deal with "scientific principals" everywhere human conduct encounters science and technology, and its concrete embodiments and consequences. There is no reason for treating patent property rights differently from other encounters. Incidentally, if there be "scientific principals" or inventions that transcend human understanding, petitioner's invention is not among them.

CONCLUSION

Petitioner has attempted to camouflage his effort to secure this Court's review of the concurrent findings of fact by the two lower courts with a frivolous argument that this Court should construe 35 U.S.C. 282 so as to adopt a number of different presumptions of validity of patents in place of the one provided for by Congress. To do so would frustrate the manifest intent of Congress, upset the well-established construction of 35 U.S.C. 282 by the Courts of Appeals, wipe out the long established body of law pertaining to presumption and force the courts to build a new body of law around the ill-conceived set of regulations proposed by petitioner for the purpose of validating his improperly issued patent. Predictably, petitioner can offer no authority or rational basis for his request. Petitioner offers no reason for granting cer-

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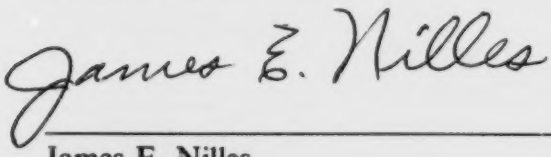
* *Walden*, by Henry David Thoreau, Bramhall House, New York, W.W. Norton & Company Inc., 1951, P. 346.

tiorari that even colorably approaches any of the considerations for granting a petition for certiorari expressed in this Court's Rule 17. The petition therefore should be denied.

Dated this 8th day of June, 1984.

Respectfully submitted,



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